IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Madan Lal.
vs.
Smt. Puspa Devi.

S.B.CIVIL SECOND APPEAL NO.343/2006 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 18.5.2006 PASSED BY SHRI VIDHYA SAGAR TAK, DISTRICT JUDGE, MERTA IN CIVIL APPEAL DECREE NO.11/2006.

DATE OF JUDGMENT ::: 17.4.2007

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr.CP Soni, for the appellant.
Mr.Om Prakash Mehta, for the respondent.

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BY THE COURT:

REPORTABLE

Heard learned counsel for the parties.

The plaintiff/respondent filed a suit for eviction of her tenant from the suit premises on the ground of default in payment of rent and personal bonafide

necessity.

The trial court vide judgment and decree dated 7.2.2002 dismissed the plaintiff's suit after holding that though the defendant has committed default in payment of rent but since the defendant is entitled to benefit under Section 13(6) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (for short 'the Act of 1950'), as he has deposited arrears of rent and paid rent month by month during pendency of suit, therefore, the decree of eviction cannot be passed against the defendant on the ground of first default. Meaning thereby, the defendant was granted benefit of first default under Section 13(6) of the Act of 1950. So far as ground of plaintiff's bonafide necessity is concerned, that was rejected by the trial court.

Being aggrieved against the dismissal of the suit, the plaintiff preferred first appeal which was registered as CAD No.9/2002. The first appellate court after hearing the parties vide order dated 19.9.2002 remitted the suit for trial on two issues. Those issues were about comparative hardship and partial eviction.

Against the order dated 19.9.2002, a misc. appeal was preferred by the appellant/defendant before this Court which was registered as S.B. Civil Misc. Appeal No.118/2003. Said misc. appeal was dismissed by this Court vide order dated 6.7.2004. Therefore, in pursuance of order of remitting the case to the trial

court, the trial court proceeded to decide two newly framed issues. During this trial, the plaintiff moved an application under Section 13(5) on which the trial court, while recording finding on the issues remitted by the first appellate court, recorded a finding that the defendant/tenant failed to pay the rent of 20 months during this period and, therefore, the defendant is not entitled to benefit under Section 13(6) of the Act of 1950.

It will be worthwhile to mention here that the trial court after remit, decided the two issues by judgment dated 15.12.2005 and prepared the decree sheet also on 4.2.2006. The defendant preferred regular first appeal (No.11/2006) against the finding of the trial court recorded on two issues by judgment dated 15.12.2005 instead of filing any objections against the findings of the trial court. In this appeal, the defendant also assailed the finding of the trial court recorded on striking out of defence of defendant. The first appellate court dismissed the defendant's first appeal no.11/2006, which was preferred against the judgment dated 15.12.2005 for which decree sheet was drawn on 4.2.2006, on the ground of delay.

The first appellate court allowed the plaintiff's appeal no.9/2002 and granted decree on the basis of

default in payment of rent. So far as challenge to finding of the trial court about personal bonafide necessity of the plaintiff is concerned, that was not accepted by the first appellate court, thereby the issue of personal bonafide necessity has been finally decided against the plaintiff by both the courts below.

Being aggrieved against the judgment and decree passed by the appellate court, the defendant/tenant has preferred this second appeal.

Learned counsel for the appellant vehemently submitted that the appellant preferred appeal and also filed an application under Section 5 of the Limitation Act. The first appellate court did not consider any of the grounds mentioned in application under Section 5 and thereby committed an error of law. In fact, rejection of first appeal of appellant (appeal no.11/06) is by a non-speaking order. In view of the above reason only, the judgment and decree of the first appellate court deserves to be set aside.

So far as non-payment of rent for 20 months during pendency of this litigation is concerned, there is no explanation but virtually it is admitted fact that the said amount has not been deposited or paid by the appellant/tenant.

Learned counsel for the appellant submitted that the principle of res judicata applies to the orders which are passed during the trial of the suit and in view of the fact that the trial court in its judgment dated 7.2.2002 gave benefit of first default to the appellant and since that finding has not been challenged by the plaintiff by preferring appeal before the first appellate court and no ground has been taken in the appeal filed by the plaintiff to challenge that benefit to tenant, therefore, the trial court had no jurisdiction to pass any order which has effect or nullify the same court's earlier order/decision. It is also submitted that the Court to which the suit was remitted by the appellate court had no jurisdiction to entertain any plea for which the appellate court has not authorised the trial court to entertain the plea. For this, learned counsel for the appellant relies upon the judgment of the Hon'ble Supreme Court delivered in the case of Satyadhayan Ghosal and others vs. Smt. Deorajin Debi and another reported in AIR 1960 SC 941 in support of his plea of res judicata and relied upon a judgment of this Court delivered in the case of Roop Kishore vs. Jugraj reported in 1954 RLW 178 which explains the jurisdiction of the court after order of remand/remittance. In view of the above reasons, according to learned counsel for the appellant, the finding of the trial court about default of 20 months

is wholly without jurisdiction and the first appellate court did not consider this aspect of the matter simply because of the reason that the first appellate court dismissed the first appeal of the appellant on the ground of bar of limitation.

I considered the submissions of learned counsel for the parties and perused the reasons given by the two courts below as well as the record.

So far as the ground of personal bonafide necessity of the plaintiff is concerned, that was rejected by the two courts below and, therefore, not an issue before this Court.

The first appellate court vide order dated 19.9.2002 remitted the matter to the trial court for decision on two issues. The trial court was ceased with the matter in pursuance of order of remit passed by the first appellate court dated 19.9.2002. It is true in view of the settled law for which learned counsel for the appellant relied upon the judgments delivered in the cases of Satyadhayan Ghosal and Roop Kishore (supra) that in that situation ordinarily (which is not the situation in the present case), the trial court certainly was not entitled to go beyond the directions issued by the first appellate court and the direction

of appellate court was for deciding the issue of comparative hardship and partial eviction. In present case when suit was remitted to the trial court, trial (for deciding two issues) started in the trial court and the suit was before the trial court pursuant to the order of the appellate court, then the jurisdiction of the court was limited by the direction issued by the appellate court but at the same time, the procedure for trial and duty of trial court to proceed in accordance with law is also rule of law. The original judgment and decree of the trial court became sub judice and trial of suit, may be for limited purpose, started again in pursuance of the order of the appellate court, than the trial court was required to see what were the rights of the parties in trial which includes the court's jurisdiction to deny the defence of the party who cannot take a defence during during this second round of litigation before the same court in same proceedings, therefore, the trial court could have examined whether the tenant complied with statutory requirments. The provisions of Sub-Sections (3), (4) and (5) of Section 13 of the Act of 1950 continues to operate during the trial and are not dependent upon any other fact because it is statutory requirement which requires the tenant to deposit the rent in time in court or he may pay the rent to the landlord during trial if he wants to keep his defence against eviction

alive. Section 13(5) very clearly provides that the tenant shall have to pay the arrears of rent or shall have to deposit the rent determined by the court as well as he shall deposit rent month by month during the entire trial. The trial continues before the trial court even if it is because of the order passed by the appellate court of remand/remit. In view of the above reasons, the trial court's order of striking out defence on non-payment of rent by the tenant during pendency of suit before the trial court was not beyond the jurisdiction of the trial court and in fact, the trial court was under obligation to pass appropriate order which was required to be passed by the mandatory provisions of law, therefore, the trial court rightly decided the question of default committed by the appellant tenant in payment of rent during trial of suit before the trial court.

The appellant/tenant wrongly preferred regular first appeal against the finding of the trial court recorded on two issues after the order of remit passed by the first appellate court. Learned counsel for the appellant submitted that since the trial court framed decree-sheet, therefore, the appellant preferred appeal. But merely because a decree sheet has not been prepared by the court, that does not change the nature of the judgment. If it does not fall within the

definition of decree than merely because the decree sheet has been prepared, it will not change the nature of the judgment/order. The provisions of CPC itself are very clear. A person aggrieved of the finding of the court below on the issues which have been recorded in pursuance of the order of remand/remit can file the objection against the findings under Order 41 Rule 26 (1) CPC. Be it as it may be, the appeal of the appellant could have been treated as an objection against the finding of the trial court under Order 41 Rule 26(1) CPC by the first appellate court but in the facts of this case, none of the facts affect the fate of this appeal because of the reason that it is admitted case that the defendant/ appellant has not paid or has not deposited the rent for 20 months which he should have deposited month by month as required by law under the provisions of the Act of 1950. The Hon'ble Supreme Court also has laid down that the delay in deposit of rent beyond the statutory period cannot be condoned.

In view of the above reasons, even if there was a mistake of the first appellate court in dismissing the first appeal of the tenant and any error was committed in not treating the said appeal as objections against the findings of the trial court, then also, in view of the fact that default in payment of rent is an admitted fact, I do not find any substantial question of law

involved in this appeal and this second appeal deserves to be dismissed.

At this juncture, learned counsel for the appellant prayed that sufficient time may be given to the appellant to vacate the suit premises.

Learned counsel for the respondent has serious objection to the grant of time to the appellant.

I considered this prayer of learned counsel for the appellant and looking to the facts of the case, this Court is of the view that the appellant be granted time upto 30.4.2008 to vacate the suit premises.

Therefore, it is ordered that in case, the appellant furnishes a written undertaking before the trial court within a period of two months from today that he shall hand over the vacant possession to the landlord by or before 30.4.2008 and shall not part with the possession or sublet the suit premises during this period and shall pay all the arrears of rent and decreetal amount, if due, and shall also pay the rent upto 30.4.2008 in advance within a period of two months from today before the trial court or directly to the landlord, the decree under challenge shall not be executed till 1.5.2008.

In case of non-compliance of the order or default

in payment of amount mentioned above, the decree shall become executable forthwith.

With the aforesaid concession, this appeal is dismissed.

(PRAKASH TATIA), J.

S.Phophaliya